

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Calaveras)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT NICHOLAS WALKER,

Defendant and Appellant.

C077073

(Super. Ct. No. 12F5644)

ORDER MODIFYING
OPINION AND DENYING
REHEARING

[NO CHANGE IN
JUDGMENT]

THE COURT:

It is ordered that the nonpublished opinion filed herein on July 26, 2019, be modified as follows:

In the second full paragraph on page 16, the final sentence reading “In each case defendant placed his hands on the victim’s vaginal area” is deleted in its entirety.

There is no change in judgment.

Appellant's petition for rehearing is denied.

BY THE COURT:

RAYE, P. J.

ROBIE, J.

RENNER, J.

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A jury found defendant Robert Nicholas Walker guilty of one count of unlawful sexual intercourse with a child under the age of 10. (Pen. Code, § 288.7, subd. (a).)¹ Sentenced to 27 years to life, defendant appeals, arguing the court abused its discretion in admitting testimony by another child; prosecutorial misconduct; instructional error; and cumulative error. We shall affirm the judgment.

¹ All further statutory references are to the Penal Code unless otherwise designated.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013 an amended information charged defendant with unlawful sexual intercourse with a child under the age of 10. The information also alleged defendant had served two prior prison terms. (§ 667.5.) Defendant entered a plea of not guilty and a jury trial followed. The following facts were introduced at trial. At the time of trial, the victim was 11 years old

Defendant, Kimberly, and the Victim.

Defendant and Kimberly married in 2002 and had a daughter, the victim, the same year. They went on to have two more children. Defendant was in and out of confinement throughout the victim's life.

2006 Incident

In 2006 Kimberly, the victim, age three, and Kimberly and defendant's son lived in a woman's shelter. One day, Kimberly discovered the victim naked on a bed with a naked eight-year-old girl on top of her, underneath a sheet. The victim did not appear to be in pain and was not crying. Kimberly believed the eight-year-old girl had previously been molested and was recreating the experience with her daughter. Kimberly reported the incident to shelter staff.

The victim did not recall the incident, but stated Kimberly later told her the girl had touched her vagina, a claim Kimberly denied.

Kimberly and defendant got back together in the spring of 2006. The couple and their children moved in with another family, the Cromers. Kimberly worked full time and defendant stayed home with the children. In 2007 defendant was arrested and incarcerated.

2008

In 2008 Kimberly and the children were living in a trailer; the victim was six years old. Defendant moved in November 2008. Kimberly and defendant both worked full time and a daycare provider took care of the children.

The victim suffered from nightmares. One night she asked to sleep in her parents' bed. Kimberly agreed and the victim climbed on top of the covers next to defendant. She wore a nightgown and underwear.

At the time, Kimberly was taking an antidepressant sleep aid that had been prescribed after a mental breakdown in 2006. She took the medication prior to going to sleep, and it made her very tired and lightheaded. Kimberly could not be easily wakened after taking the medication.

The victim fell asleep and defendant woke her up by pulling off her blanket. Defendant pulled up her nightgown and pulled down her underwear. Defendant rubbed his penis on her thighs, opened her legs, and put his penis inside her vagina. She felt pain, but neither she nor defendant said anything. He stopped when she said she had to go to the bathroom. She felt pain during urination and found blood.

The next morning, after Kimberly left for work, the victim watched television on her parents' bed. Defendant was sleeping in the bed. She fell asleep and awoke when defendant pulled up her nightgown and pulled down her underwear. Defendant put his penis on her buttocks and she felt wetness.

She asked what he was doing and defendant said he was "rubbing his dick on [her]." Defendant put his penis into her vagina; this time she felt no pain. Defendant stopped and went back to sleep. The victim left the room.

At the time, she told no one about what had happened. Later she told Kimberly "Daddy did it to me" while they were in the car. When Kimberly asked, "[W]hat?" the victim replied "he did it to me." Kimberly asked again "Who?" The victim replied "Dad." She then said, "just like never mind."

Kimberly said the victim's accusation came around the same time as accusations involving a neighbor, S.F., against defendant. Kimberly told the victim, "I think you are over hearing too many things."²

2012

In July 2012 Kimberly talked to a friend about defendant's ongoing trial involving S.F. The victim had heard that defendant had "done something" to S.F., but did not know what that meant. Kimberly told her friend she did not trust defendant and the victim said defendant had "done stuff" to her as well. The victim said she had not told anyone because she did not want defendant to leave.

Kimberly took the victim to the hospital, and afterwards the victim spent the night at a friend's house. The next morning, Kimberly told defendant about the accusations and told him to leave. Defendant moved out.

After defendant left, the victim asked to see her father. Kimberly believed if she was telling the truth she would not want to see defendant. A week later Kimberly allowed defendant to move back in. Defendant denied the allegations and insisted someone else was responsible.

About a week later, Child Protective Services (CPS) removed the children from Kimberly's and defendant's custody. Defendant told a sheriff's deputy the victim was mad at him because he would not allow her to do certain things and she might want to move away. Defendant stated a man named "TJ" might be responsible, since he looked like defendant and had been "peeping in her room." Defendant told the deputy where "TJ" used to live and work. The deputy sensed defendant believed something had

² Kimberly recalled that around that time the victim showed her toilet paper with blood on it and complained of a burning sensation in her privates. Kimberly thought she might have a rash. She did not examine the victim and the victim never mentioned it again.

happened to the victim. Defendant told the deputy he wanted the victim to get help and to find out what was going on.

Physical Examination

In August 2012 Jennifer Joses, a physician's assistant, examined the victim. Joses asked her why she was there for the exam. The victim answered, "After dad put his pee pee in my pee pee and after my dad touched me, I had bleeding in my pee pee."

Joses found no physical findings from the external physical and genital examinations. During the internal genital examination, Joses discovered a narrowing of the hymen in an area most often damaged in sexual assault victims. According to Joses, the injury could only have been caused by some form of penetration. Such penetration was consistent with the victim's statements. However, it could also have been caused by an accidental penetrating injury.

In Joses' opinion, the results were "normal" to "suspicious" and she referred the case to a forensic nurse practitioner. The nurse, after reviewing the exam results, found the hymen injury "strong suspicious."

Interview

An interview of the victim by a social worker on the same day as the physical examination was played for the jury. The victim said defendant put his penis into her vagina when she was five or six years old. It hurt and caused bleeding. Defendant also put his penis on her buttocks. She asked defendant what he was doing and he replied he was rubbing his dick on her. Kimberly did not tell her what to say when she told her story.

Defendant's Phone Call

Just before the victim was placed into foster care, defendant called her. He asked her, "Are you sure you want to do this?" Defendant asked if she knew it had happened. She said she was sure it had happened to her.

Defendant asked her how she knew it was him and suggested it could be someone else. She replied “I don’t know.” Defendant suggested it could have been one of Kimberly’s boyfriends.

When defendant suggested it could have been a dream, the victim said “I am pretty sure it wasn’t.” Defendant told her he probably wouldn’t be able to see her for a long time. She said, “I don’t want to see you leave,” and gave the phone to Kimberly.

Aftermath

The victim loves defendant and still wishes he lived with them. Kimberly and defendant separated numerous times over their 12-year marriage. They dated other people to “get back at each other.” The victim knew Kimberly’s boyfriends, but none of them touched her inappropriately.

Kimberly has custody of the victim. She never coached her or encouraged her to fabricate a sexual assault to gain custody. The victim testified Kimberly never told her what to say, but only encouraged her to tell the truth.

A.J.—Prior Allegations of Abuse

Kimberly was previously married and they had a daughter, A.J. In late 2000, early 2001 Kimberly filed for divorce and requested custody of 18-month-old A.J.

Following A.J.’s first visit with Kimberly’s ex-husband, Kimberly became disturbed by her daughter’s behavior. A.J. pointed to her private parts and Kimberly feared her ex-husband might have abused her. Kimberly filed for full custody of A.J. claiming her ex-husband had abused their daughter. Kimberly received full custody.

A subsequent criminal investigation found no evidence of abuse. A physical exam revealed A.J. had diaper rash. During a subsequent court hearing in 2001, the court asked Kimberly if she had made a false abuse allegation to gain the advantage in a custody dispute. Kimberly stated she had wanted to drop the allegation but her attorney told her to go forward.

In 2001 Kimberly and her ex-husband got back together and had a second child. The couple separated and Kimberly began seeing defendant.

In 2004, when she was five years old, A.J. began behaving suspiciously. A.J. told Kimberly “daddy did something.” Kimberly thought her ex-husband might have molested A.J. and contacted the police. At the time, A.J. was living with Kimberly, defendant, and the victim.

Kimberly told A.J. if she told the police everything she would not have to see her father again. An investigation concluded that A.J. had not been molested and that Kimberly coached her. Kimberly denied coaching A.J.

S.F.—Prior Allegations of Abuse

In 2007 defendant was arrested and charged with child molestation of 13-year-old S.F. S.F. lived with her parents across the street from where defendant and Kimberly lived.

S.F.’s father and defendant became friends working on cars. Defendant was not working and stayed home with his children. S.F. had a crush on defendant because he paid attention to her and told her she was pretty. One day defendant asked S.F., “[W]hat would you do if I kissed you?” She did not reply and defendant kissed her on the lips. S.F. was surprised.

Later, defendant kissed and touched S.F. One time he put his hand down her pants and touched her vagina. On another occasion, defendant had her sit on his lap, pulled up her shirt, and sucked on her nipple. She put her hand down defendant’s pants and touched his penis.

S.F. liked the attention. She had a crush on defendant because he was handsome, older, and liked her. After she confided in friends, one of them notified the school counselor. When questioned by police, S.F. initially denied anything happened to protect defendant. She came forward after Kimberly told her defendant “had other allegations

against him” and that “her daughter said things that she thought was strange that he had said to her.” S.F. believed the events took place between December 2006 and April 2007.

Kimberly never saw anything happen between S.F. and defendant. When Kimberly confronted S.F., S.F. denied anything happened with defendant. Later, S.F. apologized to Kimberly for destroying her family. The victim was not sure what had happened between defendant and S.F., but she had “heard stories.”

At trial in 2007 Kimberly testified on defendant’s behalf. The jury found defendant not guilty on all charges.

Defense

Expert Testimony

Dr. Paul Alan testified as an expert in gynecology and sexual assault. Dr. Alan evaluates patients for possible sexual assault.

Dr. Alan reviewed the evidence, including DVD’s of the victim’s sexual assault examination and the physician assistant Joses’ medical report. He disagreed with Joses’ finding of a narrowing of the hymen.

The victim’s hymen was not intact, but it was impossible to tell how the injury occurred. The injury was consistent with penetration by a penis, digital penetration, a fall, or self-exploration. Dr. Alan noted the hymen can be damaged without a lot of force.

No forensic evidence linked the victim’s injuries to defendant, and the findings might have been different if she could have been examined after the injury occurred. Although the physical findings of her examination were consistent with her story, they were not conclusive.

Testimony by the Cromers

Defendant and Kimberly and their family lived with the Cromers for one to two years, beginning in 2006. Kimberly worked and defendant stayed home with the children. The Cromers praised defendant's parenting skills and never saw any inappropriate behavior. The victim adored defendant and never made any statements that aroused suspicion.

S.F.'s family lived across the street. Mrs. Cromer believed S.F. was infatuated with defendant; she would giggle and call out to him. She believed S.F.'s interest was innocent and she never saw any real interactions or conversations between them. Mr. Cromer witnessed S.F. and her friends catcall and whistle at defendant. Neither Mr. nor Mrs. Cromer saw any inappropriate conduct between S.F. and defendant.

Kimberly's Testimony

Kimberly acknowledged she was taking an antidepressant sleep aid in 2008 at the time of the alleged molestations. She was prescribed the medication for posttraumatic stress disorder. As for the incident at the shelter, Kimberly asked the victim if she remembered what had happened. The victim said "No," and Kimberly explained the girl might have touched her. Kimberly did not remember telling the victim her vagina had been touched. Kimberly did not see the girl touch the victim.

Defendant's Testimony

Defendant denied any inappropriate conduct with the victim. Defendant testified he loved his daughter.

Defendant was in and out of custody throughout the victim's early years. He first went to prison in 2003, when she was four months old. Defendant had prior convictions for receiving stolen property in 2000, grand theft in 2002, and petty theft in 2003.

During one of defendant's incarcerations, Kimberly and the victim lived in a shelter. Kimberly called defendant and told him "she walked in on [the victim] and

another girl. And the other girl was on top of [the victim] fingering her.” Defendant told Kimberly to call the police, but later found she failed to report the incident. Defendant felt horrible, as though he caused it by his absence.

Kimberly, defendant, and the victim lived with the Cromers in 2006. Defendant moved out in 2007 when he returned to prison.

Defendant’s Testimony Regarding S.F.

Defendant denied any sexual contact with S.F. He and S.F.’s father worked on defendant’s truck together for about three months. S.F., 13, would talk to him. Defendant talked to her until she began acting inappropriately. She began taking pictures of defendant with a cell phone and sending her friends over to tell him things. Defendant tried to discourage S.F. by being affectionate with Kimberly in front of her. He talked about the situation with the Cromers and S.F.’s father and told S.F. to stay away.

S.F. continued to pursue defendant. He heard her tell her friend that she “was a monkey hungry for [his] banana” and wanted him to leave Kimberly to be with her. Shocked, defendant told Kimberly.

Defendant never had any inappropriate contact with S.F. A jury found him not guilty of all charges.

Defendant’s Testimony Regarding the Victim

In 2008 Kimberly, defendant, and the victim lived together. Defendant and Kimberly both worked. When Kimberly did not take her medication, she and defendant would argue. On weekends, the family would hike or ride bikes. The victim fell several times while learning to ride a bike.

The victim would come and sleep with her parents almost every night. She had nightmares and felt like someone was watching her. She would bring her pillow and blanket and sleep between defendant and Kimberly. Defendant could not have sex with Kimberly if the victim was in the same room because he felt uncomfortable.

Defendant denied doing anything inappropriate with the victim. Kimberly was a light sleeper. Although Kimberly testified her medication “knocked her out,” defendant stated none of Kimberly’s prescriptions had that effect. Nor was Kimberly taking medication during this time. Defendant counted Kimberly’s pills and discovered she was not taking her medication.

Defendant denied leaving the house after the allegations because Kimberly told him to. Following the incident, Kimberly called him about what happened. Kimberly suggested defendant was “too drugged up” to remember what happened. Defendant replied that he would not forget such serious allegations.

Defendant asked the victim if she had been dreaming. She said, “[D]addy, you did this,” but she also said, “I was sleeping and I was dreaming that somebody was touching me and then I woke up.” The allegations shocked defendant and he had no idea what she was talking about.

Defendant told Kimberly he was leaving and she replied “[W]ell, then get out.” A week and a half later, defendant called Kimberly to talk about the victim. Kimberly told defendant if he loved her and was innocent he would come home. According to defendant, Kimberly said if he did not return “she would take the kids from me and she would never speak to me again.” Before returning, defendant told Kimberly to make sure everything was okay and to clear things with the landlord, since she had started everything and then just wanted to let it go. Kimberly later called defendant and told him he could return.

Defendant was home when CPS took the children. Defendant spoke with the detective and told him he wanted to know what happened to the victim and wanted her to get counseling. Defendant told the detective he did not think she realized how serious the allegations were.

Defendant believed the victim wanted to live with her grandparents who kept her horse. She thought she could do so if she went into foster care. Kimberly and a CPS

agent had a conversation with the victim about this approximately a year before her allegations against defendant. The CPS agent told the victim she would not be able to choose where she lived. After the conversation, she stopped talking about wanting to live with her grandparents.

Defendant was upset when his children were taken away and cooperated with CPS and law enforcement. At the time of trial, defendant had not seen his children in two years. Defendant believed the victim had been coached to make statements during the investigation. However, defendant did not believe she had been coached in her trial testimony.

Defendant was with Kimberly when she was going through her divorce and custody battle with her ex-husband. He described the custody battle as “ugly.” Defendant testified that Kimberly told her children that if they no longer wanted to see her ex-husband and they wanted to live with Kimberly and defendant, “all they had to do was tell them that he hurt them and they wouldn’t have to move away anymore.” A.J.’s statements mirrored what Kimberly told them to do.

Defendant did not know why Kimberly gave up custody of her other children, but believed it was because she could not handle them and because her ex-husband did not want them. Defendant described Kimberly as passive-aggressive.

Rebuttal

Kimberly testified she never saw the victim suffer any injuries from riding her bike. Nor did Kimberly threaten to keep the children from defendant. She only kept them away from him when he was incarcerated over the pending charges in order to protect them.

Kimberly denied telling the victim or A.J. what to say. She gave up custody of A.J. because she had a mental breakdown in 2006.

Verdict and Sentencing

The jury found defendant guilty. The court sentenced defendant to 27 years to life for unlawful sexual intercourse with a child under 10 years of age, plus two years consecutive for the two prison priors. (§§ 288.7, subd. (a), 667.5, subd. (b).) Defendant filed a timely notice of appeal.

DISCUSSION

Admission of S.F.'s Testimony

Defendant argues the trial court erred in admitting S.F.'s testimony about her allegations of sexual misconduct involving defendant. Defendant reiterates that he was tried and acquitted of seven sex offenses involving S.F. in 2007. According to defendant, the court's admission of the evidence of these prior allegations violated his rights to due process and a fair trial and constituted a manifest abuse of discretion.

Background

Defendant moved to exclude evidence that he had been charged with seven counts of sexual abuse and lewd acts involving S.F. under Evidence Code sections 1101 and 352. The acts were alleged to have taken place in 2006. The jury acquitted defendant of all charges in 2007.

The prosecution moved to admit evidence of defendant's prior sexual offenses under Evidence Code section 1108. Defendant's alleged acts were "kissing, fondling of breasts, rubbing of the vaginal area and vaginal penetration with a foreign object" on a 13-year-old girl in 2006. The prosecution argued S.F.'s testimony was probative and not unduly prejudicial under Evidence Code section 352.

Defendant argued the prejudicial impact of the evidence outweighed its probative value because the two cases were completely different and a jury acquitted him in the previous trial. Defendant insisted there was a "vast difference" between charges of

molesting a six-year-old child, and charges of kissing and touching a pubescent female who was pursuing him.

The prosecution replied that acquittal was not a bar to admission of the evidence and the jury could be instructed on how to consider such evidence. The prosecution sought to present three witnesses: S.F., an investigator from the district attorney's office, and a friend of S.F.'s who witnessed a kiss between S.F. and defendant.

The court denied defendant's motion to exclude S.F.'s testimony. The court observed the evidence was "somewhat prejudicial" because defendant had been acquitted on the prior charges. The court expressed concern that "the jury may find those charges are true and bolster perhaps the weakened charges here and feel he got an acquittal over there when he should not have."

However, the court determined the evidence was substantially probative in that it tended to bolster the credibility of the victim to events only she and defendant were witness to. The court found no undue consumption of time or risk of jury confusion. In addition, the court noted any risk of confusion on the part of the jury could be rectified by jury instructions. The evidence would take a day or less of court time.

Discussion

In general, evidence of a defendant's uncharged conduct is not admissible to prove that the defendant has a criminal disposition or propensity. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) But Evidence Code section 1108 provides that when a defendant is charged with a sexual offense, evidence of the defendant's other sexual offenses is not made inadmissible by Evidence Code section 1101 if the evidence is not inadmissible under Evidence Code section 352.

The Legislature, in enacting Evidence Code section 1108, recognized that "sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event

and requires the trier of fact to make difficult credibility determinations.’ ” (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1160; *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) Evidence Code section 1108 allows the trier of fact to consider uncharged sexual offense evidence as evidence of the defendant’s propensity to commit sexual offenses in evaluating the defendant’s and the victim’s credibility and in deciding whether the defendant committed the charged sexual offense. (*Villatoro, supra*, at pp. 1160, 1164, 1166-1167; *Falsetta, supra*, at pp. 911-912, 922.)

However, uncharged sexual conduct evidence is not admissible if the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, §§ 352, 1108, subd. (a).)

The California Supreme Court has provided guidance on the admissibility of prior sexual offenses: “Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*Falsetta, supra*, 21 Cal.4th at p. 917.)

We review a trial court’s Evidence Code section 352 determination under the deferential abuse of discretion standard. (*People v. Avila* (2014) 59 Cal.4th 496, 515.) We will not reverse unless the trial court exercised its discretion in an arbitrary, capricious, or absurd manner resulting in a miscarriage of justice. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

Defendant presents several objections to the trial court's exercise of its discretion in admitting testimony regarding S.F. He claims the misconduct involving S.F. was insufficiently similar to be admissible, pointing out that S.F. was a teenager and no relation, while the victim was his six-year-old biological daughter.

The court considered this and found: "Although [S.F.] was several years older than the children involved in this case it still involv[s] sex acts with children to which the defendant had substantial access both as daughter and stepdaughter in one case here, than the neighbor across the street for which the defendant had substantial amount of contact as well." We agree. The evidence revealed a past instance in which defendant took advantage of a vulnerable victim situated nearby. Defendant's acts with each victim were also similar. In each case defendant placed his hands on the victim's vaginal area.

Defendant also contends there was an inadequate degree of certainty in the commission of the prior allegations. In a related argument, defendant states he is being forced to relitigate the prior trial. We disagree.

The evidence was not so remote as to warrant exclusion. The prior acts against S.F. allegedly took place in 2006 and a jury acquitted defendant in 2007. Defendant's abuse of his daughter allegedly occurred between October 2008 and October 2009. In addition, the conduct towards S.F. was similar to defendant's alleged abuse of his daughter. Defendant kissed and fondled an alleged infatuated 13-year-old girl. Nor would the evidence consume an undue amount of time; the prosecution estimated the testimony would only take a few hours and it ultimately required the testimony of a single witness, S.F.

Defendant reiterated the fact of his acquittal throughout both direct and cross-examination and during closing argument. The court provided the jury with instructions regarding the prior uncharged sexual conduct: "If you decide that the defendant committed the uncharged offense, you may, but you are not required to conclude that the evidence that the defendant was disposed or inclined to commit sexual crimes or offenses

or based on that decision, also conclude that the defendant was likely to commit and did commit” the charged crime. (CALCRIM No. 1191, as given.)

The court also told the jury that “If you conclude that the defendant committed the uncharged offenses, that conclusion is also only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of a violation of Penal Code Section 288.7 as charged in this case. The People must still prove the charge beyond a reasonable doubt.” (CALCRIM No. 1191, as given.) As noted, the jury was well aware that defendant had been acquitted of all charges against S.F.

We agree with the trial court’s assessment of the uncharged acts against S.F. The evidence was material in demonstrating defendant’s propensity to commit the charged crimes and was not unduly inflammatory or confusing, nor would it take up an undue amount of time at trial. We find no abuse of discretion in the trial court’s admission of the evidence under Evidence Code section 1108 or in the trial court’s determination under Evidence Code section 352.

Prosecutorial Misconduct

Defendant claims the prosecution committed misconduct in attempting to impeach the jury’s 2007 verdict in the trial over S.F.’s allegations and speculating as to why the 2007 jury rejected S.F.’s claims against defendant. According to defendant, “This was an improper attempt by the prosecution to impeach the 2007 jury’s verdict by presenting evidence going to the mental processes during deliberations which produced the acquittal verdict.”

Background

During S.F.’s testimony, the prosecutor questioned her about the 2007 jury trial. At the beginning of direct testimony, the prosecutor asked whether she had a speech impediment. S.F. responded that she stutters which impacts her ability to communicate

when she is nervous or anxious. The prosecutor asked, “[D]id your stutter play a part in your [2007] testimony?” and S.F. answered, “Yes.”

The prosecutor asked S.F. about defendant touching her inappropriately. S.F. described defendant putting his hands down her pants and touching her vagina. The prosecutor asked “[W]ere you as comfortable talking to the jury about the things you are now as back then?” S.F. replied, “No, it’s still kind of awkward, too.” The prosecutor then asked: “Do you feel you were this forthcoming in your last testimony at trial?” S.F. responded, “No. No.” Defense counsel objected that the question called for speculation. The trial court sustained the objection.

The prosecutor then asked S.F. whether she was able to give the same details at the last trial. S.F. said she had not and explained “I don’t think -- I think I was more uncomfortable. [¶] . . . [¶] And I don’t -- I didn’t have as much knowledge as I do now.”

During closing argument, defense counsel stated: “Let’s talk about the trial over in . . . 2007, the jury heard the evidence just like you. They heard all the evidence over there, just like you, they heard from [S.F.], they heard from [Kimberly], they heard from [defendant]. When they were done, they found [defendant] not guilty.

“You can’t do anything better than that, to have a jury look into all the allegations, to have the evidence presented in court. Was it a fair procedure? We looked at it and heard from everyone over there. [S.F.] testified they found him not guilty, but the prosecutor wants you to use that against him.

“He was found not guilty. That is what our whole constitution is all about. If people say I didn’t do it, they are entitled to a trial. They stand trial, the prosecutor, if they can prove their case, they can. If they can’t, they can’t. . . . they did not prove the case, that is phenomenal, that is reasonable doubt. Jury found reasonable doubt.”

During closing argument, the prosecutor responded: “Think about the trial for [S.F.] [Defense counsel] told you they saw all the evidence, they heard all the testimony,

they had it all. Guess what they didn't have? They didn't have [the victim.] They didn't have [the victim's] vagina that has injuries to it. They didn't have that.

“What did they have? They had a thirteen-year-old girl, her word against a twenty-four-year-old man and they had nothing else. Can you see why they made their decision? Of course they [*sic*] can. But they didn't have the benefit of knowing that it happened to [the victim] and it happened to another girl, you do. That is the difference in this trial.”

Discussion

A prosecutor's conduct violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to deny the defendant due process. Prosecutorial conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 427 (*Bryant*); *People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).)

It is misconduct for the prosecutor to misstate the law during argument, misstate or mischaracterize the evidence, or assert facts not in evidence. (*People v. Whalen* (2013) 56 Cal.4th 1, 77; *People v. Davis* (2005) 36 Cal.4th 510, 550; *People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) Moreover, it is improper for the prosecution to vouch for the veracity of witnesses by reference to facts outside the record. (*People v. Williams* (1997) 16 Cal.4th 153, 257.)

When the prosecutorial misconduct is based on the prosecutor's comments before the jury we consider whether there is a reasonable likelihood the jury construed or applied any of the complained of remarks in an objectionable fashion. (*Bryant, supra*, 60 Cal.4th at p. 427.) We review the challenged statements within the context of the record and argument as a whole. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) In

addition, we do not lightly infer that the jury drew the most, rather than the least, damaging meaning from the prosecution's statements. (*People v. Shazier* (2014) 60 Cal.4th 109, 144.)

As a general rule, a defendant must object to the prosecution's misconduct and request an admonition when the misconduct occurs. (*Samayoa, supra*, 15 Cal.4th at p. 841.) The defendant's failure to object or request an admonition is excused if it would not have cured the harm caused by the misconduct. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.)

The People argue that by failing to make a timely and specific objection, defendant forfeited his claim of prosecutorial misconduct. In light of defendant's alternative claim of ineffective assistance we shall address his misconduct claim on the merits.

Defendant argues the prosecutor's statements were an attempt to impeach the 2007 jury's acquittal verdict and "violated a bedrock principle of California law that a jury's verdict may not be impeached with evidence attacking the mental processes by which the jury arrived at its verdict. (Evid. Code, § 1150; *People v. Steele* (2002) 27 Cal.4th 1230, 1263-1264.)" We disagree.

The prosecutor asked S.F. about her prior testimony in an effort to ascertain her credibility in the current case. S.F.'s credibility was a disputed issue and the questioning did not impugn or undercut the prior 2007 verdict. Defendant argued his acquittal proved he did not molest S.F. In closing argument, the prosecutor responded to defendant's claim. The focus of the prosecutor's comments and questioning was S.F.'s credibility, not the validity of the jury's 2007 verdict.

The trial court instructed the jury that counsel's "questions are not evidence, only the witness's answers are evidence. The attorneys' questions are significant only if they help you understand the witness's answers. [¶] Do not assume something is true just because one of the attorneys asks a question that suggests it is true." (CALCRIM

No. 222, as given.) In addition, the court instructed the jury that counsel's statements during closing argument are not evidence.

The prosecution enjoys wide latitude to discuss and draw inferences from the evidence at trial; whether those inferences are reasonable is for the jury to decide. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Here, the prosecution's questioning and closing statements sought to explain why S.F. was a credible witness despite defendant's prior acquittal, not to impugn the 2007 jury verdict. Given the significant leeway counsel enjoys when discussing both the legal and factual merits of the case during argument, we find no misconduct. (*People v. Centeno* (2014) 60 Cal.4th 659, 666.)

Instructional Error

Defendant contends the trial court erred in failing to instruct on the lesser included offenses of misdemeanor battery or assault. (§ 242.) We disagree and find no error.

Background

Initially, during jury instruction discussions, the trial court expressed an intent to instruct on the lesser included offense of misdemeanor assault and battery. (§§ 240, 242.) The prosecution objected, stating the statute of limitations on those offenses had expired and any conviction would be barred.

Defense counsel countered: "Well, if the jury were to find him guilty of that, then the Court would just tell them by operation of law the statute of limitations had expired." The prosecutor argued the jury "can't even consider it. He can't be convicted of a crime right now, it's statutorily barred." The court concluded "I will decline to give the lesser in that the statutes have run. The defendant cannot be found guilty of those."

Discussion

The trial court must instruct on all lesser included offenses which are substantially supported by the evidence, whether or not requested by defense counsel. Included in this duty is an obligation to instruct on lesser included offenses when the evidence raises a

question as to whether the greater, charged crime has been proven and there is substantial evidence that only a lesser included crime was committed. If the trial court fails to instruct on the lesser included offense, we reverse only if, after considering the entire record, we find a reasonable probability that the error affected the outcome of the trial. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 165.) However, the existence of any evidence “ ‘no matter how weak’ ” will not justify instructions on a lesser included offense. (*Id.* at p. 162.) Instead, such instructions are required only if the evidence that defendant is guilty of the lesser offense is “ ‘substantial enough to merit consideration’ ” by the jury. (*Ibid.*)

Section 288.7 provides: “(a) Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life.” Sexual penetration is defined as “the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.” (§ 289, subd. (k)(1).)

Battery is “any willful and unlawful use of force or violence upon the person of another.” (§ 242.) Assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.)

Initially, the trial court found assault and battery were lesser included offenses of sexual penetration of a child under the age of 10. However, the court concluded the expiration of the statute of limitations on the lesser included offenses precluded giving the instructions.

A defendant may “expressly waive the statute of limitations when . . . the waiver is for his benefit.” (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 370 (*Cowan*).) Under *Cowan*, a defendant may waive the statute of limitations to a lesser included offense to obtain jury instructions on a time-barred lesser included offense. (*Ibid.*) When a

defendant requests an instruction on a lesser included offense and it appears to be time barred, the court must attempt to elicit a defendant's express waiver of a limitations period defense. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1359-1360.)

Defendant requested instructions on assault and battery. However, before denying the request, as the People concede, the court failed to ascertain whether defendant was willing to waive the statute. (*Cowan, supra*, 14 Cal.4th at pp. 370, 376.) Despite this error, we reverse only if it is reasonably probable that a more favorable outcome would have been reached absent the error. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 158.)

There is no such probability here. The outcome of this case hinged on the testimony of the victim. She testified defendant removed her underwear, rubbed his penis against her, and then inserted it into her vagina. She suffered injury to her vagina from a penetrating force. The next day defendant pulled down her underwear and put his penis on her buttocks.

Defendant denied ever touching the victim inappropriately or abusing her sexually. He argued if she was abused, defendant was not responsible. Instead, she might have been molested by the girl in the shelter or by one of Kimberly's boyfriends. Defendant also argued Kimberly had coached the victim to accuse him.

Given the victim's testimony and defendant's defense, there is no evidence from which the jury could find defendant not guilty of sexual penetration of a child under 10, but instead guilty of assault or battery. Defendant, citing *People v. Barton* (1995) 12 Cal.4th 186, 196, argues "the Supreme Court has never held a defendant must admit to the elements of the lesser included offense before the law requires instruction on these lesser crimes." However, that is not the issue before us. There was no evidence defendant was guilty of assault or battery, but not guilty of sexual penetration of a child

under the age of 10 years. The victim testified defendant penetrated her vagina with his penis. Defendant denied ever inappropriately touching her. We find no error.³

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

RENNER, J.

³ Defendant also argues the cumulative effect of the errors he alleges make it reasonably probable he would have obtained a more favorable result in the absence of these errors. Since we find no error we reject defendant's argument.